NO: NHH-CV-19-5003875-S	:	SUPERIOR COURT/ HOUSING SESSION
NYRIEL SMITH, et al.,	:	
PLAINTIFFS,	:	J.D. OF NEW HAVEN
V.	:	
CITY OF NEW HAVEN, et al.,	:	
DEFENDANTS.	:	July 16, 2019

DEFENDANTS' OPPOSITION TO
MOTION FOR CLASS CERTIFICATION

Defendants, City of New Haven, Toni Harp, in her official capacity as the mayor of the City of New Haven, Byron Kennedy[1], in his official capacity as director of New Haven Health Department, and Paul Kowalski, in his official capacity as director of environmental health, New Haven Health Department, hereby oppose Plaintiffs Nyriel Smith's and Muhawenimana Sara's Motion for Class Certification (the "Motion"). Plaintiffs have failed to meet the requirements of class certification and the Motion should be denied.

I. INTRODUCTION

Plaintiffs contend that City has violated municipal law, which they allege requires it to undertake lead inspection and abatement activity in favor of any member of the proposed class with an elevated blood lead level ("EBLL") in excess of five µ/dL. Plaintiffs purport to bring claims against Defendants on behalf of a proposed class alleged to consist of 300 members, which they define as "all children living in New Haven, Connecticut, who are six years old or younger and either presently have, or will in the future have, EBLLs in excess of five µ/dl." Pfts' Memorandum of Law in Support of Motion ("MOL") at 2.[2] Yet although the putative class seems

[1] Mr. Kennedy has resigned from his position since the commencement of this case.

[2] The lawsuit may be mooted because the City has recently adopted a policy to issue abatement orders and conduct lead inspections at the dwelling of any child under the age of six with a EBLL in excess of five µ/dL (the "Revised

simply defined, it cannot stand the rigorous scrutiny required for certification. Plaintiffs have not met their heavy burden and cannot show the Court which children would be class members on any given day. As the class is defined by Plaintiffs, children will age out and, as Plaintiffs recognize by seeking to represent children whose BLL exceeds five μ/dL in the future, age in. Further, as the evidence already before the Court demonstrates, children's BLL can change over time. A child may be a putative class member one day, but then not a putative class member at the next blood test. Further, children move in and out of dwellings. For example, Plaintiffs' counsel has informed Defendants that Plaintiff Sara no longer resides at the dwelling identified in the complaint. In addition to showing that Sara lacks standing and the ability to function as a class representative, her move underscores Plaintiffs' failure to define a class with certainty.

Moreover, Plaintiffs' case against the City cannot be adjudicated as a class action because they do not meet the other requirements of class certification, a showing that is subject to a "heavy burden" of proof in Connecticut state court. Practice Book §§ 9-7 and 9-8 govern whether class claims can be tried by representation. Plaintiffs' claims for injunctive relief do not meet the requirements for certification for the following reasons:

- Plaintiffs do not meet the requirements of Practice Book § 9-7(1), which precludes certification unless the class "so numerous that joinder of all members is impractical." Courts in Connecticut hold that joinder is not satisfied where the proposed class resides in a centralized location and is easily identifiable. The factor also requires the plaintiff to demonstrate that there are other members of the proposed class who are interested in pursuing the litigation. Plaintiffs fail to identify any additional plaintiffs who are interested in joining this case. Nor have they proffered proof as to the size of the proposed class; rather, only a conclusory statement, evidently based on outdated information, that the proposed class is comprised of approximately 300 members. Plaintiffs have also failed to demonstrate that joinder is impractical where each proposed class member resides within City limits.

Policy"), and, moreover, has publically stated, through both its mayor and board of alders, that it is formally amending municipal law to comport with the Revised Policy.

- Plaintiffs do not meet the requirements of Practice Book § 9-7(2), which precludes class certification unless the plaintiff can show that "there are questions of fact or law common to the class" that generate common answers apt to drive the resolution of the litigation. Among other problems, Plaintiffs fail to satisfy this requirement because the question of whether injunctive relief should enter in favor of *each proposed class member*, is a highly individualized and fact-intensive inquiry that cannot be economically adjudicated in the context of a class action without resort to separate mini-trials for each putative class member.

- Plaintiffs do not meet the requirements of Practice Book § 9-7(3), which precludes class certification unless the plaintiff can show that her "claims and defenses" against the defendant are "typical of the claims or defenses of the class." The typicality requirement requires the plaintiff to have standing. Plaintiffs have *already* been awarded injunctive relief, and such relief is moot as to Sara who no longer resides in an allegedly contaminated dwelling. As such, Plaintiffs can articulate no redressable injury, and therefore do not have standing to assert claims on behalf of the class.

- Plaintiffs do not meet the requirements of Practice Book § 9-7(4), which precludes class certification unless the plaintiff can show that she can "fairly and adequately protect the interests of the class." Plaintiffs cannot fairly and adequately represent the class because they can no longer benefit from any further relief and therefore have no incentive to prosecute this case on behalf of the class. Moreover, their counsel fails to verify that they have sufficient class action experience, which is a prerequisite for appointment as class counsel.

- Plaintiffs do not meet the requirements of Practice Book § 9-8(2), which precludes class certification unless the plaintiff can show that the defendant "acted, or refused to act, on grounds generally applicable to the class." Because Plaintiffs do not specify otherwise, the members of the putative class include residents of federally subsidized housing. Federally subsidized housing is under the delegation of Elm City Housing Authority, and subject to Department of Housing and Urban Development ("HUD") requirements that require Elm City Housing Authority — not the City — to conduct lead inspections at the dwelling of any child under the age of six who records an EBLL in excess of five µ/dL. Inasmuch as the City previously had a policy of conducting lead inspections only as to dwellings of children under six with EBLLs of 20 µ/dL or more that policy, by operation of law, never applied to federally subsidized housing, which is outside the scope of the City's mandate. As such, the City has not acted in a manner generally applicable to the class where its lead inspection policy did not even apply to that portion of the proposed class who resides in federally subsidized housing.

Certification fails as a matter of law for any of the foregoing reasons. For these reasons, and others discussed below, the Motion should be denied.

II. LEGAL STANDARD

In addition to properly defining a class, under Practice Book §§ 9-7 and 9-8, the plaintiff bears the "heavy burden " of demonstrating that the four prerequisites to class certification — adequacy, typicality, commonality and numerosity —have been met, and that the party opposing the class has acted or refused to act on grounds generally applicable to the class. Practice Book §§ 9-7, 9-8; Arduini v. Auto. Ins. Co. of Hartford, 23 Conn. App. 585, 589 (1990) ("plaintiff bears the heavy burden of establishing that each requirement of the [class certification] rule is met").

To determine whether the plaintiff has met this "heavy burden" a "rigorous analysis" is required. Arduini v. Auto. Ins. Co. of Hartford, supra, 23 Conn. App. at 589. "The rigorous-analysis requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of the class-action rule"; rather, the court must look "beyond the allegations of the plaintiff's complaint" to determine if certification is appropriate. Standard Petroleum Co. v. Faugno Acquisition, LLC, 330 Conn. 40, 49 (2018). A motion for class certification must be denied if the moving party fails to prove any one of the prerequisites for class certification. See Viglione Heating & Cooling, Inc. v. AIU Ins. Co., No. UWYCV085007892SX02, 2010 WL 797192, at *2 (Conn. Super. Ct. Feb. 5, 2010).

III. ARGUMENT

Plaintiffs have not properly identified a class and fail to satisfy the other prerequisites for class certification.

A. The Proposed Class Is Unworkable And Not Properly Defined

"[A]lthough not explicitly set forth as a class action requirement in the Practice Book, there is the critical element of properly defining a class" that must be established by any plaintiff moving for class certification. Parker v. Colgate-Palmolive Co., No. X08CV030193798, 2004 WL

3090652, at *9 (Conn. Super. Ct. Nov. 29, 2004). There is no basis in the City Ordinances, as currently written, for certifying a class of children in New Haven with EBLLs in excess of five µ/dL "*who are six years old* or younger." (Emphasis added.) MOL at 2. New Haven Ordinance § 16-61(g) defines lead poisoning as "a blood lead concentration equal to or greater than twenty (20) micrograms per deciliter of whole blood, or any other abnormal body burden of lead a defined by the Centers for Disease Control and Prevention." Id. It is the City's position that the CDC has not defined any "*other* abnormal body burden of lead," but has only specified a "reference level" for blood of 5 µ/dL for children *under six* that indicates a "level of concern," not an "abnormal" result. (emphasis added) Therefore, even if the CDC's "reference level" enhances the level of inspection protocol for a unit with a child with an EBLL, it does so, as the Court has observed, only with respect to those children who are *under six*. See Memorandum of Decision, dated 6/17/2010 ("MOD") at 6. Similarly, General Statutes § 19a-111c requires owners of premises with toxic levels of lead to abate or remediate lead hazards, but only if the residence is home to a child "under the age of six." Id. There is accordingly no basis in state or municipal law for certifying a class of children comprised of children aged six or older.

Even as to those children who are under six, it is impractical to certify the class because its composition is not sufficiently definite so as to feasibly determine, on any given day, whether a child is a member of the class or not. "The inability to define a class with some degree of accuracy or by some reasonable objective standard and without the necessity of individualized inquiries has been held repeatedly to be grounds to deny certification. Parker v. Colgate-Palmolive Co., supra, 2004 WL 3090652 at *9 (citing cases). That inquiry will be confused by confounding variables like proposed class members aging into or out of the class, moving residences, moving out of the City limits, and EBLLs that over time fall below or above actionable limits. Such individualized

inquiries will predominate and overwhelm any other consideration in the case and the ability to proceed on a class basis. For example, under Plaintiffs' rubric the City would be required to inspect a dwelling and take other steps even when the child has moved and there may no longer be risk. From a policy perspective, this would draw resources away from those with a greater need. An improperly defined putative class cannot be certified.

B. The Proposed Class Is Not So Numerous That Joinder Is Impractical

Practice Book § 9-7(1) requires that the class be "so numerous that joinder of all members is impractical." Id. There is no "magic number" of class members that automatically meets the numerosity requirement because that requirement is predicated on the impracticability of joinder under the circumstances of the case. See Arduini v. Auto. Ins. Co. of Hartford, supra, 23 Conn. App. at 590. Conclusory allegations that joinder is impracticable and speculation about the size of the class is not sufficient to meet the numerosity requirement. See id.

Plaintiffs fail to meet the numerosity requirement because they do not demonstrate, as is their burden, that joinder is impractical. Meeting this burden necessarily requires Plaintiffs to proffer evidence showing that there is an appreciable number of proposed class members who are interested in pursuing the class action. Where such evidence is lacking, Connecticut courts regularly deny motions for class certification. See, e.g., Mason v. Barbieri, No. X04HHDCV085035997S, 2016 WL 2891522, at *3 (Conn. Super. Ct. Apr. 28, 2016) (motion to certify class of 377 members denied because "plaintiffs did not show how many of [them] would be interested in pursuing the litigation" such that court was unable to "make a determination regarding the impracticality of joinder"); Parker v. Colgate-Palmolive Co., No. X08CV030193798, 2004 WL 3090652, at *4 (Conn. Super. Ct. Nov. 29, 2004) (numerosity requirement not satisfied where court was provided with "no evidence . . . of any other persons

interested in pursuing a claim"); Maltagliati v. Wilson, No. CV 970575612, 1999 WL 971116 at *4 (Conn. Super. Ct. Oct. 7, 1999) (proposed class consisting of 118 members did not meet numerosity requirement because plaintiff did "not produce evidence that any appreciable number" of them were "interested in pursuing a class action"). Here, Plaintiffs claim that the proposed class is comprised of approximately 300 members, but given their inability to define the class properly, they have not met their burden. Moreover, Plaintiffs do not allege, even in conclusory terms, that there are members of the proposed class that have expressed any interest in joining this case. In the City's experience, most residents resist its requests to conduct home inspections, claiming that they do not have the time or patience to endure the four to five hour inspection process.

Even assuming that a substantial number of proposed class members are interested in participating in this litigation, there is no indication that the number would be so great as to make joinder impracticable, especially where, as here, every member of the proposed class resides in New Haven and could be identified on a case-by-case basis. "Proximity and ease of identification [of potential class members] tend to make joinder more practicable." Maltagliati v. Wilson, supra, 1999 WL 971116 at *4 (collecting cases). Accordingly, motions for class certification are denied where the proposed class members are centrally located. See, e.g.,Villano v. Constantinou, No. X07CV010077486S, 2003 WL 21101527, at *1 (Conn. Super. Ct. May 2, 2003) (class certification denied for lack of numerosity where the "vast majority" of proposed class members "live in the eastern part of the state, making the Vernon Judicial District convenient for those who choose to bring suit"); Maltagliati v. Wilson, supra, 1999 WL 971116 at *4 (numerosity not satisfied where potential class members were "all located in Connecticut, with an overwhelming majority in the greater Hartford area"); see also Towns of New Hartford & Barkhamsted v. Connecticut Res.

Recovery Auth., No. UWYCV040185580SX02, 2006 WL 853217, at *8 (Conn. Super. Ct. Mar. 21, 2006) (noting that the centralized location of class members favored joinder as parties).

Plaintiffs have failed to meet the numerosity requirement and, as such, may not maintain a class action.

C. There Are No Issues Of Law Or Fact Common To The Proposed Class

Practice Book § 9-7(2) precludes class certification unless the plaintiff can show that there are questions of fact or law common to the class as whole. "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (citation omitted).

Here, Plaintiffs argue that the common questions of law and fact are whether, for each member of the proposed class, the City: (i) is failing to conduct lead inspections, issue abatement orders, and ensure abatement of all lead hazards, (ii) has created "a new policy or rule" in violation of the Connecticut constitution and state statute, and (iii) is sending notices to families of children who recorded an EBLL regarding lead hazards as required by law. MOL at 7-8. The answers to these questions cannot be found by mere inquiry into to the City's course of dealing with Plaintiffs. While such an inquiry would perhaps give clarity on whether the City met its legal obligations toward Smith or Sara, that inquiry would have precisely nothing to do with whether or not the City has met its legal obligations toward any other member of the proposed class.

The problem is underscored in the very relief that Plaintiffs seek. Plaintiffs request an injunction compelling the City to conduct lead hazard inspections at the residences of Sara and Smith and issue abatement orders if necessary. If the class is certified, then each member of the class will presumably also be entitled to an order compelling the City to conduct lead hazard

inspections and, if appropriate, issue abatement orders at their homes. Whether the Court should issue an injunction in favor of each member of the proposed class, requires the Court to determine whether the City has failed to meet its legal obligations with respect to each one of the proposed class members in the first place. This is an impracticable undertaking. Further, Plaintiffs allege that the proposed class allegedly exceeds 300 members, but offer no clear methodology as to how class adjudication would proceed.

Each proposed class members' need for injunctive relief requires answers to a host of highly particularized questions, including, whether, as it relates to each member: (i) the City was notified of an EBLL in the first instance; (ii) the child was exposed to lead while a City resident or prior to becoming one; (iii) whether the child received lead contamination from the home or some other source (as is often the case); (iv) the City sent a lead hazard notice to the family; (v) the City conducted a home inspection or attempted to do so; (vi) the City's inspection results impelled an abatement order or not; and (vii) the owner of any home for which an abatement order was issued complied with it or ignored it. These questions have the potential to generate not common, but rather, disparate answers that cannot serve to drive the litigation forward. The result would be mini-trials for each member of the proposed class to determine whether the City has met its legal obligations as they relate to each member of the class. Litigation so inherently fact-specific as to the equitable relief requested by each proposed class member cannot be efficiently adjudicated in a class action.

Class certification is also not appropriate here because there are issues of law that and a regulatory scheme do not apply evenly across the class. As discussed in sub-section F, infra, the proposed class, as defined by Plaintiffs, includes individuals who reside in federally subsidized housing. Pursuant to the HUD Lead Safe Housing Rule ("HUD requirements"), the Public Housing

Authority (here, Elm City Housing Authority), not the City, bears the burden of conducting lead inspections at federally subsidized housing. As the case progresses, the City will continue to assert that it cannot be enjoined to conduct lead inspections at federally subsidized housing because that responsibility, as a matter of federal law, is borne not by it, but by the public housing authority. The focus on this issue will work a disservice on those members of the proposed class who do not reside in federally subsidized housing, thus militating against class certification here. The case therefore fails to satisfy the commonality requirement of Practice Book § 9-7(2).

D. Plaintiffs' Claims Are Not Typical Of The Proposed Class

A class cannot be certified if the claims or defenses of the representative parties are not typical of the claims or defenses of the class. Practice Book § 9-7(3). Plaintiffs are not typical of the class members they seek to represent because they prevailed already on their claims against the City as reflected in the Court's June 17, 2019 ruling on their Application for Injunctive Relief, and because the case is moot as to Sara who no longer resides in an allegedly contaminated dwelling and therefore may not benefit from the granting of any further relief. Consequently, Plaintiffs are not incentivized to act in the best interest of the proposed class and do not have standing to assert a viable claim against the City as a matter of law.

i. Plaintiffs Are Not Incentivized To Act In The Interests Of The Proposed Class

Plaintiffs fail to address in their Motion why they should be permitted to represent a class of children who are in a different position than their own and for whom they have no current incentive to represent. In deciding whether a case qualifies as a class action, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (Internal quotation marks omitted.) Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982). Plaintiffs were awarded the injunctive relief they requested, and Sara no longer resides in

an allegedly contaminated dwelling. As such, they are not members of the class because they cannot prove any ascertainable loss that can be redressed by this lawsuit. It follows that they have no incentive to litigate the case and are not appropriate or permissible class representatives. See Standard Petroleum Co. v. Faugno Acquisition, LLC, 330 Conn. 40, 55, 191 A.3d 147, 161 (2018) (typicality only satisfied if "the class representative's interests and incentives will be generally aligned with those of the class as a whole"); Macomber v. Travelers Prop. & Cas. Corp., supra, 277 Conn. at 634 (purpose of typicality review is "to assure that the absentees' interests will be fairly represented"). Plaintiffs are plainly not aligned with the putative class members.

ii. Plaintiffs Lack Standing

Apart from the fact that Plaintiffs interests do not align with the putative class, Plaintiffs Motion fails for a more fundamental reason: they do not have standing to assert claims against the City. It is black-letter law that "a predicate to the plaintiff's right to represent a class is his eligibility to sue in his own right." (Internal quotation marks omitted; brackets omitted.) Macomber v. Travelers Prop. & Cas. Corp., supra, 277 Conn. at 632.; id. at 633 ("[T]here cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class."). "It is not enough that the conduct of which the plaintiff complains will injure *someone*." (Emphasis in original.) Blum v. Yaretsky, 457 U.S. 991, 999 (1982). Rather, a plaintiff moving for class certification "must also show that he is within the class of persons who will be concretely affected" by the defendant's action. Id.; see Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) ("a class representative must be part of the class and possess the same interest and suffer the same injury as the class members"). Accordingly, courts regularly deny class certification where a representative plaintiff does not have standing to assert claims against all members of a defendant class. See, e.g., Macomber v.

Travelers Prop. & Cas. Corp., supra, 277 Conn. at 632-33 (collecting cases). See also Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) ("class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation")

For example, in Macomber, supra, the plaintiff brought an action against several insurance companies, claiming that the defendants, in utilizing structured settlements to resolve various types of personal injury claims, had routinely engaged in certain types of wrongdoing that caused monetary harm to plaintiff and other putative class members. The court found that plaintiff could not sustain a cause of action against one of the defendants because its alleged wrongdoing did not occur until four years after the plaintiff entered her structured settlement. Because the plaintiff had not standing to assert a claim against that defendant, the court found that she was not a typical class representative and reversed the trial court's ruling granting class certification. Macomber v. Travelers Prop. & Cas. Corp., supra, 277 Conn. at 618-634.

In Pratt v. Univ. Accounting Servs., LLC, No. X10UWYCV10116011594S, 2012 WL 4378051, at *11 (Conn. Super. Ct. Aug. 28, 2012), the plaintiff brought a CUTPA claim against the defendant, the servicer of her student loan. The plaintiff claimed that she received a letter from the defendant that falsely stated that her student loan was "severely delinquent and defaulted" and contained other misrepresentations. Id. at *1. The plaintiff moved to certify a class consisting of putative members who allegedly received the same letter from the defendant. Plaintiff admitted that defendant's conduct did not cause her any direct financial harm. The court declined to certify the class on grounds that the plaintiff failed to demonstrate any "ascertainable loss," a prerequisite for standing and bringing a CUTPA action. Id. at *10-11.

In Viglione Heating, supra, the plaintiff brought an action against eleven insurance companies, claiming that the insurance companies were charging excessive policy premiums, and seeking to certify a class consisting of other policy holders. Observing that the plaintiff had an insurance policy with only one of the eleven defendants, the court found that absent privity of contract between plaintiff and the remaining defendants, plaintiff lacked the requisite standing to satisfy the typicality requirement of the test for class certification. Viglione Heating & Cooling, Inc. v. AIU Ins. Co., supra, 2010 WL 797192, at *2.

In all of these cases, the plaintiffs were not typical class members because they lacked standing to sue, either because they had asserted no viable claim or could prove no ascertainable loss. Plaintiffs here likewise lack standing. The test for standing is twofold: "first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the challenged action, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the challenged action." (Internal quotation marks and brackets omitted.) Wilcox v. Webster Ins., Inc., 294 Conn. 206, 214–15 (2009); see also Johnson v. Rell, 119 Conn. App. 730, 737, 990 A.2d 354, 360 (2010) ("An allegation of injury is both fundamental and essential to a demonstration of standing.")

Plaintiffs satisfy neither requirement. They do not have a "specific, personal and legal interest" in the case because neither can benefit from the relief requested. The Court has ruled already in Plaintiffs' favor and awarded them the injunctive relief they were seeking. Specifically, the Court directed the City to (i) provide the parents of Smith with certain lead hazard information, and (ii) determine and order abatement of lead poisoning hazards at Plaintiffs' dwelling. MOD at

15. The City has complied with the injunction.[3] Moreover, Sara and her family have moved from the dwelling she lived in when the complaint was filed. For these same reasons, neither Plaintiff can claim to be injured by the City's action or inaction. The City has met its legal obligations and redressed any injury as to Plaintiffs, and, with respect to Sara in particular, it can no longer take any action imposed by law for her benefit since she has moved.

Because Plaintiffs have failed to satisfy the typicality requirement, their certification motion must be denied.

E. Plaintiffs Are Not Adequate Class Representatives

Practice Book § 9-7(4) provides in relevant part that class certification may be granted "only if . . . the representative parties will fairly and adequately protect the interests of the class." Id. "The adequacy requirement is met [when] the representatives: (1) have common interests with the unnamed class members; and (2) will vigorously prosecute the class action through qualified counsel." Collins v. Anthem Health Plans, Inc., 275 Conn. 309, 326, 880 A.2d 106, 116 (2005). Neither requirement is met here.

i. Plaintiffs Do Not Have Common Interests With Unnamed Class Members

As discussed above, there are quite clearly conflicts of interest between Plaintiffs and the proposed class, which preclude class certification. Unlike the putative class members, Smith has had her dwelling inspected. In the case of Sara, the relief sought is moot because she no longer

[3] The injunction was moot as to Sara who no longer resides in the residence at which the Court ordered the City to conduct a lead inspection. As to Smith, the results of the City's lead inspection indicated, contrary to the Court's finding in its June 17, 2019 Memorandum of Decision, that there was no peeling or chipping lead-based paint inside Smith's apartment. Smith's mother also informed the lead inspector that her child does not play or spend any time in any area of the property where she might access lead hazards.

resides in the same dwelling. Plaintiffs therefore have no incentive to litigate this case vigorously and cannot adequately or fairly protect the interests of the proposed class.

ii. Plaintiffs' Counsel Is Not Qualified To Serve As Class Counsel

To be appointed class counsel, the party seeking appointment must demonstrate that she has sufficient "experience in handling class actions" and "resources [to] commit to representing the class." MacNamara v. City of New York, 275 F.R.D. 125, 144 (S.D.N.Y. 2011). Plaintiffs have not met this burden. In fact, they have not even submitted an affidavit verifying their class action experience or that they are otherwise qualified to represent the proposed class. The only support they offer in support of their claim that they have class action experience is reference to three cases, all of which were apparently litigated over 15 years ago. Only attorney Shelley A. White is listed as counsel of record on these cases, and Plaintiffs give no detail about the level of involvement Ms. White had in these matters, such as whether she served as lead counsel or played a supporting role. Plaintiffs lead counsel, Amy Marx, provided the Court with no specific information about prior class action experience that would allow the Court to find she satisfies the adequacy of counsel requirement on behalf of the Plaintiffs.

Plaintiff also fail to demonstrate they have the resources to commit to the putative class. Plaintiffs do not give the Court any information about the scope of discovery and the expert and fact witnesses they intend to call at trial. Given that Plaintiffs apparently seek to prove that City failed to meet its legal obligations toward approximately 300 proposed class matters, and that each member of the proposed class is entitled to injunctive relief, it is reasonable to conclude that discovery in this case will be substantial. Yet, Plaintiffs make no representations about their available resources or whether they are sufficient to serve the interests of the proposed class.

As Plaintiffs have filed to satisfy the adequacy requirement for class certification, their motion should be denied.

F. The City Has *Not* Acted On Grounds Generally Applicable To The Class

Class certification fails under Practice Book § 9-8(2) unless the moving party can demonstrate that the defendant "acted or refused to act on grounds generally applicable to the class." Practice Book § 9-8(2). The City's policy of conducting lead inspections with respect to dwellings of children with EBLL's greater than 20 µ/dl does not apply to those members of the proposed class who reside in federally subsidized housing, and therefore does not apply uniformly to each member of the proposed class as required by § 9-8(2). As discussed above, the HUD requirements expressly provide that the burden of conducting lead inspections falls on the Public Housing Authority (in this case, Elm City Housing Authority) not the local health department, and, that inspections of federally subsidized residences are to be conducted for any EBLL great than 5 µ/dl.. Because the City's lead inspection policy does not even pertain to federally subsidized housing, the City cannot be said to have acted in a manner generally applicable to the proposed class, let alone be enjoined to take action in favor of that portion of the class that is outside the scope of its mandate as a matter of law. Plaintiffs therefore fail to satisfy the requirement of Practice Book § 9-8(2)

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully that Plaintiffs' Motion for Class Certification be denied.

DEFENDANTS,
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TONI HARP, IN HER OFFICIAL CAPACITY AS MAYOR OF NEW HAVEN; BYRON KENNEDY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NEW HAVEN HEALTH DEPARTMENT; AND PAUL KOWALSKI, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF ENVIRONMENTAL HEALTH, NEW HAVEN HEALTH DEPARTMENT

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CERTIFICATION

This is to certify that a copy of the foregoing was electronically mailed on this 16th day of July 2019 to all counsel and pro se parties of record as follows:

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